JUDGMENT : Daubney J. Supreme Court of Queensland. Trial Division. Brisbane. 1st December 2008.

[1] Toga Development No 31 Pty Ltd ('Toga') was and is the principal for a development known as 'Swell' at Burleigh Heads ('the Project'). JM Kelly (Project Builders) Pty Ltd ('JMK') was the building contractor for the Project.

[2] In 2006, JMK commenced a proceeding (No. 3651 of 2006) which, as presently constituted, is against Toga and the superintendent of the Project, Suters Architects Pty Ltd ('the JMK Claim'). By that proceeding, JMK seeks to recover, in essence, the difference between what it says Toga agreed to pay it for building the Project and the lesser amounts which have been certified by the superintendent and actually paid to it by Toga, as well as certain heads of consequential loss. By proceeding no. 959 of 2008, Toga sued JMK and JM Kelly Group of Companies Pty Ltd (a guarantor of JMK) for monies which Toga alleges are due to it by JMK under specified Payment Certificates issued by the superintendent in relation to the Project ('the Toga Claim'). Those two sets of proceedings have been consolidated. Toga has now moved for summary judgment against JMK only for the amounts shown in those Payment Certificates.

[3] Central to the litigation between Toga and JMK is a dispute about the terms of the contract by which Toga retained JMK to build the Project. Toga's case is that, in mid-2004, it and JMK entered into a written agreement ('the Toga Agreement') by which JMK agreed to undertake the construction of the Project. It has put a copy of the Toga Agreement in evidence before me.

[4] JMK admits having executed the Toga Agreement, but contends that this document does not evidence the contractual terms between it and Toga. Rather, by reference to its defence to the Toga Claim and its statement of claim in the JMK Claim, it is clear that JMK admits that it '*entered into a "Contract" in respect of the Project whereby JMK agreed to undertake the "Trade Cost Allocation Works" for the construction of the Project for the "Contract Price" (as those terms are defined in paragraph 29 of the JMK Claim*).[1] (For clarity, I will refer to the contract which JMK propounds as 'the JMK Contract'.) Paragraph 29 of the JMK Claim, in turn, contends that:

'*The [JMK Contract] was partly written, partly oral and partly implied. Insofar as it was written it was constituted by the Sub-contract Quotations, the Contract Set of Drawings, the Revised Area Drawings, the JMK Tender Clarification and the General Conditions of Contract AS 2124-1992 (the "General Conditions")*.'

[5] Each of the Toga Agreement and the JMK Contract is said by each party respectively to contain the Australian Standard General Conditions of Contract AS 2124-1992 ('the General Conditions').

[6] Clause 42 of the General Conditions provides, inter alia:

'42. CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more to less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the contract including but not limited to any amount due or to be credited under any provision of the Contract.

If the contractor fails to make a claim for payment under clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

Notwithstanding Clause 42.4, the Principal shall be obliged to pay for any item of unfixed plant and materials where that item is-

[1] See paragraph 4.2 of JMK's defence to the Toga Claim.

(i) to be imported into Australia, provided the Contractor has given the Principal a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Principal and, where appropriate, a custom's invoice for the item; or

(ii) listed in the Annexure and which is not an item to be imported into Australia, provided the Contractor establishes to the satisfaction of the Superintendent that the Contractor has paid for the item, and the item is properly stored, labelled the property of the Principal and adequately protected.

Upon payment to the Contractor of the amount which includes the value of the item, the item shall be the property of the Principal free of any lien or charge.

Except as provided in the Contract, the Principal shall not be obliged to pay for any item of unfixed plant and materials which is not incorporated in the Works.

42.2 Correction of Payment Certificates

At any time and from time to time, the Superintendent may by a further certificate correct any error which has been discovered in any previous certificate, other than a Certificate of Practical completion or Final Certificate.

42.3 Retention Moneys

The Principal may deduct from moneys otherwise due to the Contractor amounts up to the limit of the percentages, if any, stated in the Annexure of so much of the value of the respective items stated in the Annexure as is included in the calculation of a payment.

...

42.5 Certificate of Practical Completion

The Contractor shall give the Superintendent at least 14 days notice of the date upon which the Contractor anticipates that Practical Completion will be reached.

When the Contractor is of the opinion that Practical Completion has been reached, the Contractor shall in writing request the Superintendent to issue a Certificate of Practical Completion. Within 14 days of the receipt of the request, the Superintendent shall give to the Contractor and to the Principal a Certificate of Practical Completion certifying the Date of Practical Completion or give the Contractor in writing the reasons for not issuing the Certificate.

When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical completion whether or not the Contractor has made a request for its issue.

42.6 Effect of Certificates

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal or Contractor.

42.7 Final Payment Claim

Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'.

The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof.

After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.

42.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contact or any alleged breach thereof.

Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise between the parties arising out of the Contract, that the works have been completed in accordance with the terms of the Contract and that any necessary effect has been given to all the terms of the Contract which require additions or deductions to be made to the Contract Sum, except in the case of-

(a) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said Certificate;

(b) any defect (including omission) in the works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate;

(c) any accidental or erroneous inclusion or exclusion of any work, plant, materials or figures in any computation or any arithmetical error in any computation.

Within 14 days after the issue of a Final Certificate which certifies a balance owing by the Principal to the Contactor, the Principal shall release to the Contractor any retention moneys or security then held by the Principal.

42.9 Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or

the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate stated in the Annexure and if no rate is stated the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals.

42.10 Set Offs by the Principal

The Principal may deduct from moneys due to the Contractor any money due from the Contractor to the principal otherwise than under the Contract and if those moneys are insufficient, the Principal may, subject to Clause 5.5, have recourse to retention moneys and, if they are insufficient, then to security under the Contract.

42.11 Recourse for Unpaid Moneys

Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party may, subject to Clause 5.5, have recourse to retention moneys, if any, and, if those moneys are insufficient, then to security under the Contract and any deficiency remaining may be recovered by the other party as a debt due and payable.'

[7] JMK lodged claims for payment with the superintendent, albeit contending that these were claims for payment under the JMK Contract.

[8] In the Toga Claim, Toga alleges (in paragraph 8 of its statement of claim) that, pursuant to the Toga Agreement, JMK was issued with Payment Certificates numbered 51, 52, 54, 56B, 57B, 58C, 59, 60, 61, 66, 68 and 69. These Payment Certificates certified amounts due to Toga by JMK. JMK has not paid the amounts stated in those certificates, which total some $1,053,648.62, nor has it paid interest thereon. Toga has put copies of those certificates in evidence before me, and now applies for summary judgment for the sums it claims are due and owing to it under those Payment Certificates, plus interest.

[9] JMK admits the issuing of these documents, but pleads and contends that they are merely purported Payment Certificates, that the documents lack efficacy because they were not issued under the JMK Contract, and otherwise denies liability to pay the sums claimed by Toga on a number of grounds, which I will summarise briefly:

(a) JMK contends that it is not indebted to Toga, but rather, on the basis of specific matters pleaded in the JMK Claim, Toga is indebted to it. Those matters are claims by JMK against Toga for what JMK contends were wrongful refusals by the superintendent to issue Certificates of Practical Completion for the separable portions under the JMK Contract, and the superintendent's alleged wrongful failures to correctly certify amounts due to JMK under its progress claims, for variations, and for extensions of time;

(b) JMK claims an entitlement to set off a claim it makes in the JMK claim against Toga for loss of efficiency claims;

(c) JMK contends that, if it be held that the parties were bound by the Toga Agreement, then, on the basis of a case articulated in the JMK Claim that Toga engaged in misleading or deceptive conduct in contravention of s 52 of the Trade Practices Act 1974 ('TPA'), JMK is entitled to an order under s 87 of the TPA avoiding the Toga Agreement *ab initio*, with the consequence that the Payment Certificates on which Toga relies are of no effect;

(d) JMK's alternative claim is that, in such circumstances, Toga is liable to it for damages under s 82 of the TPA, and JMK would set this off against the monies claimed by Toga under the Payment Certificates;

(e) As separate contentions, JMK says that the Payment Certificates relied on by Toga are of no force because of:

(i) the superintendent's wrongful conduct in issuing them (it being contended that the superintendent did not fairly or reasonably assess the claims, and in any event undertook the wrong task by assessing the claims under the Toga Agreement rather than the JMK Contract);

(ii) deficiencies in the form of the Payment Certificates, in that they do not:

A. expressly state that the superintendent is of the opinion that the amount certified is due to Toga;

B. set out the reasons, or any proper reasons for the difference between the amount claimed by JMK and the amount certified as due to Toga.

(f) JMK contends that it is entitled to set off against Toga's claim the damages which JMK claims for breaches by Toga of clause 23 of the General Conditions (that being, in brief, the term obliging Toga to retain the superintendent and ensure that the superintendent acts fairly and reasonably in performance of the superintendent's duties);

(g) JMK also contends that it is entitled to set off the amounts which JMK contends are due to it by Toga under specified unpaid Payment Certificates;

(h) Finally, JMK contends that any judgment in Toga's favour in respect of the sums claimed under the Payment Certificates ought be stayed pending the hearing and determination of the JMK claim.

[10] In ***Elderslie Property Investments No 2 Pty Ltd v Dunn***,[2] I said:

'*[6] Since* ***Deputy Commissioner of Taxation v Salcedo***,[3] *it is firmly established that UCPR 292 is to be applied according to its tenor, and the '****no real prospect of successfully defending****' test contained in UCPR 292(2)(a) is to be applied according to its own terms and not according to the considerations relevant under the previous rules for summary judgment. But it is, nevertheless, necessary for the court to adopt a careful approach in an application for summary judgment. The court needs to be satisfied not only that the defendant has no real*

[2] [2007] QSC 192

[3] [2005] 2 Qd R 232.

> *prospect of successfully defending all or a part of the claim, but also that* ***'there is no need for a trial of the claim or the part of the claim'****. As Atkinson J said in* ***Deputy Commissioner of Taxation v Salcedo****:*[4]
>
> *The goal of just resolution of the real issues is protected by the necessity to satisfy the requirements of both paras (2)(a) and (b) and the residual discretion the court has to refuse summary judgment even when the requirements of paras (2)(a) and (b) are satisfied.*
>
> *[7] As this is the plaintiff's application, the burden of satisfying the court of the matters referred to in UCPR 292(2)(a) and (b) rests on the plaintiff: see* ***Qld Park Pty Ltd v Lott****;*[5] *as his Honour observes there, this approach is consistent with that under the former rules. As under the former rules,*[6] *where a plaintiff leads evidence to make out a prima facie entitlement to judgment, the evidentiary onus shifts to the defendant: see* ***Qld Park Pty Ltd v Lott****.*[7]
>
> *[8] The overall burden of proof in an application under UCPR 292, however remains on the plaintiff. True it is that in many cases the evidence required for the plaintiff to make out its prima facie entitlement will be relatively straightforward, such as in the case of proving a debt due and owing, and the evidentiary shift means that the real focus will be on determining whether the defendant has put on material sufficient to persuade the Judge that the court should not be satisfied that the defendant has no real prospect of defending the claim. But, as will appear below, this is not such a case.'*

[11] It was suggested in the course of argument on behalf of JMK that it is somehow to be inferred from my observations, and the reference therein to ANZ Banking Group Ltd v Barry, that there remains a requirement in applications for summary judgment under the UCPR for the applicant to depose to a belief that there is no defence to the claim. No such inference arises from anything I said in that case – my reference to a specific passage in ANZ Banking Group Ltd v Barry was in connection with the evidentiary onus which rests on parties on applications for summary judgment. In contrast to the requirements of the previous rules of Court, there is no requirement under the UCPR for there to be such a deposition by an applicant for summary judgment.

[12] The necessity for me to adopt the 'careful approach' on the present application, to which I referred in Elderslie, and which I propose adopting here, is informed by the consideration that, notwithstanding the statement of the test to be applied in Rule 292, it remains a tenet of the Court's approach to summary judgment applications that issues raised in proceedings will be determined summarily only in the clearest of cases.[8]

[13] Mr Digby QC, who appeared with Mr Harris for JMK, raised as a preliminary response to the application for summary judgment the contention that Toga had failed to put on material to satisfy the Court both that JMK had no real prospect of successfully defending Toga's claim and that there was no need for a trial of Toga's claim. Mr Inatey SC, who appeared with Mr Schulte for Toga, accepted in argument that he bore that onus, but contended, in effect, that even on the cases advanced on behalf of JMK, the Court ought be satisfied to the requisite level of there being no real prospect of JMK successfully defending Toga's claim and of the absence of need for a trial of Toga's claim.

[14] In that regard, and generally in relation to the application, it was submitted for Toga that, regardless of whether the Court finds that the relationship of the parties was governed by the Toga Agreement or the JMK Contract, both parties propound the General Conditions as applicable to their respective versions of the contractual relationship. It was submitted for Toga that, even if it be found that the JMK Agreement governed the parties' relationship, clause 42 of the General Conditions nevertheless operated to confer on Toga an entitlement to recover for the amounts certified in its favour under the Payment Certificate on which it bases its claim.

[15] Toga submitted that, regardless of whether the parties were bound by the Toga Agreement or the JMK Contract, the terms of clause 42 of the General Conditions applied such as to require JMK to make the payments certified under each Payment Certificate, notwithstanding any dispute which JMK might have as to its liability to have those payments levied against it. In that regard, Toga relied on the line of authorities which are to the effect that payment certificates such as those issued in this case under provisions such as clause 42 have effect as 'warrants for payment', notwithstanding that the payments should be regarded as provisional and on account of a final reckoning between the parties at the time of completion of the contract. To comprehend that reasoning, it is sufficient to refer to the judgment of Williams JA, with whom Davies JA and Mackenzie J agreed in ***Daysea Pty Ltd v Watpac Aust Pty Ltd,***[9] in which his Honour observed:

> *'[18] Paragraphs [4] and [6] are found in identical terms in the General Conditions AS4300-1995. Not surprisingly those provisions have been the subject of judicial consideration. As already noted in* ***re Concrete Constructions Group Pty Ltd*** *this Court held that those paragraphs constituted detailed provisions regulating the rights of the parties as to progress payments. It is also important to bear in mind, as was emphasised by McPherson JA and Helman J in that case at 12, that:* ***"Such claims and payments are, in building contracts in the common form, always intended to be provisional only ... That is to say, they await the day when a final certificate issues, in which the ultimate indebtedness by one party to the other is ascertained and fixed.****" The significance of the clause,*

4 Ibid, 45.
5 [2003] QCA 271, 41 (Jones J).
6 As to which see, for example, ***ANZ Banking Group Ltd v Barry*** [1992] 2 Qd R 12, 19 per Derrington J.
7 [2003] QCA 271, 41 (Jones J).
8 See ***Deputy Commissioner of Taxation v Salcedo*** [2005] 2 Qd R 232, per McMurdo P at [3]; see also the observations of Holmes J (as she then was), with whom Davies JA and Mullins J agreed, in ***Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*** [2003] 1 Qd R 259 at [7].
9 [2001] QCA 49

recognised in that judgment, is that the progress payments are critical to the survival of the contractor and to the completion of the project.

[19] That point was emphasised in the reasoning of this Court in ***Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd*** *[1995] 2 Qd R 521; that was another case dealing with a clause in virtually identical terms of Clause 42.1 here. Davies JA said at 523: "Though the precise meaning of all that appears in those clauses is not completely clear, their general intention ... appears to be that, notwithstanding that claims and counter claims may later be the subject of arbitration, a prima facie sum may be made payable by issue by the Superintendent of a payment certificate pursuant to Clause 42.1." In that case, McPherson JA said at 524 that those provisions mean "that the Principal is bound to pay the amount certified by the Superintendent as the payment which is to be made by the Principal" regardless of claims the Principal may have which are not covered by the certificate. Such claims, as he pointed out at 527, are to be resolved at the stage of final resolution of any disputes between the parties. In making those observations he referred at 527 to a number of single Judge decisions indicating that a strict approach should be taken to the construction of Clause 42.1 One of the cases referred to was* ***Thiess Constructions Pty Ltd v Pavements & Excavations Pty Ltd*** *(SC No 3709 of 1989; 2 February 1990). That was a case where a certificate issued within the 14 day period, but subsequently the Superintendent sought to withdraw it and replace it with another certificate specifying a lower amount payable by the principal. It was held that the contractor was entitled to payment in accordance with the certificate issued within time; it could not be effectively withdrawn.*

[20] Of more significance is the decision of Rolfe J in ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** *(1997) 14 BCL 215. The clause in question there was in the same terms as Clause 42.1 here. The learned Judge found that the certificate issued by the Principal's Representative did not satisfy the requirements of paragraph (a) to (f) of paragraph [4]. In consequence he said that "the Payment Certificate failed to comply with various contractual obligations as to its contents and that, accordingly, it was not a valid notice". His reasoning for so concluding is set out in the following passage:*

> *"... the effect of a Payment Certificate is to require the recipient to pay the amount stated. Failure to do so could lead to summary judgment and there is no right to dispute the amounts payable until the dispute resolution procedures are activated. Accordingly, the recipient of the certificate is required to pay money during the course of the contract which, at the end of the day, it may be found it does not owe. The requirement to pay money may lead to financial difficulties for the payer, just as the failure to receive money during the course of the contract may cause financial difficulties to the payee. Also the payee may not be able, at the end of the day, to refund any overpayment. Considerations such as these lead me to the conclusion that a certificate must comply strictly with Clause 42.1 if it is to have the consequences specified."*

[21] That reasoning is in my view compelling. As all of the cases I have just referred to establish, the consequences of issuing a certificate are serious. The proprietor is bound to pay the amount of the certificate notwithstanding that the amount is provisional only and subsequently may be found to be incorrect. Notwithstanding such considerations the proprietor must pay the amount specified in the certificate and take the chance that any excess can be recovered subsequently. Similarly, the contractor is not entitled to payment of anything more than the amount specified in the certificate though it may well be less than the progress claim made. Even though it may ultimately be found that the contractor was entitled to more, the recovery of any such amount must await the determination of disputes at the end of the contract.

[22] Because of the consequences which flow from the issuing of the certificate strict compliance with the provisions of Clause 42.1 is required. That, in any event, is the natural consequence of the use of the word "shall" in paragraphs [4] and [6] in particular. It is not necessary to imply any terms in order to arrive at that result. Interestingly all parties agree that the provision in relation to payment by the Principal consequent upon the issuing of a valid certificate is mandatory; in my view it would be odd if the provisions relating to the issuing of the certificate, though mandatory in terms, were held not to be so.'

[16] In ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd,***[10] Rolfe J cited the following observation of Giles J in **Sabemo Pty Ltd v De Groot:**[11]

'The scheme of the contract is that claims and cross-claims which are disputed will go to arbitration, but that each party shall continue to fulfil its part of the contract – performance of the works by the builder and payment by the proprietor – notwithstanding the reference of disputes to arbitration. At the end of the contract account will be taken of the disputes in relation to the payment of the final certificate. The disputes may have been resolved by an award prior to that time, but if they have not the result of the arbitration will determine what monetary adjustment (either way) will be made.'

[17] It seems to me, however, that the matter is not quite as straightforward as Toga would present it. The mere fact that each of the Toga Agreement and the JMK Contract, in the forms as contended for by each of the parties, contains the General Conditions does not necessarily mean that a payment certificate purportedly issued under, for example, the Toga Agreement has efficacy as a payment certificate under the JMK Contract, if it ultimately be held that that was the contractual arrangement between the parties.

[18] It is more than tolerably clear that payment claims issued in accordance with clause 42 of the General Conditions are necessarily referrable to the contract of which those General Conditions are part. So, for example, the

[10] (1998) 14 BCL 215
[11] (1991) 8 BCL 132

opening paragraph of clause 42.1 requires that a contractor's 'claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the contractor arising out of or in connection with the Contract or for any alleged breach thereof.' (Underlining added). The term 'Contract' in the General Conditions is defined in clause 2 to mean 'the agreement between the Principal and the Contractor'. In a case such as the present, where the essence of the main dispute between Toga and JMK is precisely what is the agreement between them, it is difficult to see how it can be said with sufficient certainty on a summary basis that amounts claimed to be certified in Toga's favour purportedly pursuant to the Toga Agreement have efficacy if it be held that the relationship between the parties was governed by the JMK Contract.

[19] An important element of Toga's submission was to refer to the provisions of clause 47.1 of the General Conditions:

'***47.1 Notice of Dispute***

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.'

[20] This clause, Toga contended, facilitates the resolution of the sorts of disputes which JMK raises, particularly those referred to in the claimed 'set-offs', but does not detract from the obligation on JMK to make payment pursuant to the Payment Certificates, albeit recognising that these are made 'on account only'. That submission misses the point, however, that clause 47.1 specifically relates to disputes which arise 'out of or in connection with the Contract' (as that term is defined in the General Conditions).

[21] Toga did not put on any material before me with a view to satisfying me that JMK has no real prospect of successfully establishing that the contractual arrangements between the parties was regulated by the JMK Contract. On that basis alone, I would refuse the application for summary judgment.

[22] In view of my conclusion on this fundamental aspect, it is unnecessary for me to deal with the other contentions raised, for example with respect to the interpretation of the Payment Certificates. Indeed, given my conclusion that the application for summary judgment should be refused, it is probably inappropriate for me to express even a preliminary view on those matters.

[23] I would, however, make this further observation. Even if I had been of the view that Toga had satisfied me that JMK had no real prospect of successfully defending the claim for payments under the Payment Certificates, there would have been a very real question remaining as to whether I considered there to be no need for the trial of the Toga Claim or, in any event, whether I would exercise a residual discretion to refuse the application for summary judgment. The present case is different from other cases which have considered the effect of payment certificates as 'warrants for payment' in a number of respects. Somewhat exceptionally, the Payment Certificates in this case call for payment by the builder to the principal. But in any event, the Project was certified as complete by November 2007 (at the latest). It is uncontroversial that one of the rationales for a payment certificate regime of the type provided for by clause 42, which requires certified amounts to be paid 'on account' pending final determination of claims between builder and principal, is to ensure, at least so far as payments to builders are concerned, the flow of cash through the sectors of the building industry engaged in particular projects. As McPherson JA and Helman J observed in ***Re Concrete Constructions Group Pty Ltd***,[12] progress payments '*are ordinarily critical to the survival of the contractor and so to the completion of the project*'. Their Honours said:

'*If not paid as [the contractor] goes, on a substantial project like this, the contractor will soon be forced to stop work.*'

[24] As against that, there is clearly, as has been contended for by counsel for JMK, a factually intensive investigation to be undertaken for the purpose of the Court determining what were the contractual arrangements between these parties and what were the consequences of their dealings with one another. There are many millions of dollars at stake between the parties. Whilst each of those matters, of itself, may not have precluded the award of summary judgment if the applicant had otherwise established an entitlement thereto, in the particular circumstances of this case they are matters to which I would certainly have needed to refer for the purposes of determining whether, in any event, I considered that there needed to be a trial of Toga's claim. In view of my conclusion as to the first element, however, it is unnecessary for me to say anything more about that aspect.

[25] In the result, the application for summary judgment will be dismissed. The costs of and incidental to that application will be reserved.

G J Digby QC with G P Harris for the plaintiff instructed by Hopgood Ganim
G Inatey SC with R Schulte for the first defendant instructed by Colin Biggers & Paisley

12 [1997] 1 Qd R 6 at 13